No. 95-1956

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF SOUTH DAKOTA and CITY OF OACOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, PUYALLUP TRIBE, ST. CROIX BAND OF CHIPPEWA INDIANS, AND STANDING ROCK SIOUX TRIBE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Each of the Amici Tribes is a federally recognized Indian Tribe. The interest of amici curiae is vital and immediate. Each Tribe gave up large areas of land to the United States, which in return assumed the duty of protecting the Tribe in those retained. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Notwithstanding that obligation, each of these Tribes con-

tinued to suffer devastating land losses, particularly during the Indian allotment era,[1] and from the decimation of their land base followed the destruction of their economies, institutions, culture and communities.

To reverse this policy and the disastrous effect that it had on Indian tribes, Congress in 1934 enacted the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA"). By it, Congress sought "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Act's purposes—the rebuilding of tribal self-government and Indian communities—are to be achieved by tribal and federal implementation of the Act's eighteen sections. Of these, Section 5, 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire land in trust for Indians, is a crucial part. That section has, for more than 60 years, served as the principal mechanism for restoration of trust land to Indians and tribes.

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[1] Between 1887, when the General Allotment Act was enacted, and 1934, Indian land holdings were reduced by 90 million acres, leaving but 48 million acres in Indian hands. Felix S. Cohen, *Handbook of Federal Indian Law* 138 (1982 ed.). Amici Tribes were among those to sustain these losses. For example, under the allotment policy, by the 1920s almost all of the land within the 18,000-acre reservation of the Puyallup Tribe had passed into non-Indian ownership leaving the Tribe impoverished. The Tribe has since been able to reacquire some of those lands under the statute at issue in this case, Section 5 of the Indian Reorganization Act. When the City of Tacoma challenged the Secretary's authority to acquire land, the court rejected that challenge, finding that the "Puyallup Tribe . . . is a striking example of an entity the drafters of section 5 sought to aid." *City of Tacoma v. Andrus*, 457 F. Supp. 342, 346 (D.D.C. 1978). When the Puyallup subsequently settled a land claim with the City, the agreement included Congress' assurances that the Secretary shall continue to exercise "the authority provided him in section 5 of the . . . [IRA], and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations. . . ." 25 U.S.C. § 1773c. The Puyallup Tribe now has approximately 600 acres of land in trust.

Section 5 has been essential for the Amici Tribes to slow—though not necessarily stop—their loss of land. Indeed, to this day, far more Indian land passes out of trust than into trust.[2] Each Amici Tribe has an interest in lands held in trust pursuant to Section 5, and a substantial interest in the constitutionality and continued implementation of that statute.[3]

SUMMARY

Notwithstanding 60 years of jurisprudence recognizing the Secretary's authority in Indian affairs, including his authority to acquire land in trust for Indians, a divided panel of the Court of Appeals for the Eighth Circuit struck down Section 5 of the IRA as unconstitutional. Invalidation of an Act of Congress is sufficient reason in itself to grant the petition for *certiorari*. *See United States v. Gainey*, 380 U.S. 63, 65 (1965).

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[2] For example, for the sixteen tribes with reservations in Nebraska, North Dakota and South Dakota, including Amici Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe, the Bureau of Indian Affairs reports that from 1985 to 1995, a total of 46,399 acres passed from trust to fee status while 18,120 acres were taken into trust. As to the Cheyenne River Sioux Reservation, since 1934, 287,216 acres passed out of trust, while 12,921 acres had been taken into trust.

After losing several million acres of their land in southern Wisconsin and northern Illinois in treaties with the United States, Amicus Ho-Chunk Nation (Wisconsin Winnebago) lived as squatters and fugitives in their ancestral homes. *See* Nancy Lurie, "Winnebago," 15 *Handbook of North American Indians*, at 697-99,702-03 (Smithsonian Institution 1978). Even after they were allowed by Congress to use their own funds to purchase trust allotments, most of those lands were lost when placed on county tax rolls, with many such tracts passing out of trust in the 1950s. Today, the Ho-Chunk Nation holds only 845.23 acres of land in trust, restored to it under Section 5 of the IRA.

[3] All parties have consented to the filing of this brief amici curiae. The consents have been filed with the Clerk.

Review is further compelled by the grounds on which the court of appeals ruled. The decision conflicts with those from this Court that expressly reject nondelegation doctrine challenges where, as here, the " 'entity exercising the delegated authority itself possesses independent authority over the subject matter.' " *Loving v. United States*, No. 94-1966, slip op. at 24, 64 U.S.L.W. 4390, 4397 (U.S. June 3, 1996) (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) and citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936)). These decisions control in this case. Contrary to their teaching, the court of appeals invalidated Section 5 on nondelegation doctrine grounds without any consideration of the independent constitutional authority vested in the Executive branch in Indian affairs, or the broad discretionary authority historically exercised by the Executive—not only in Indian affairs but also with regard to the acquisition and administration of land for federal and other purposes. Indeed, the court made no reference to *United States v. Mazurie*, which was this Court's controlling precedent.

The court's declaration that Section 5 is unconstitutional further conflicts with every other decision, including one from this Court, to address Section 5. This Court recognized the vitality of Section 5 in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 155-56 (1973), and other courts have consistently rejected challenges to the Secretary's authority to take land in trust under it. *E.g., Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1252 (11th Cir. 1985); *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 162 (D.D.C. 1980); *City of Tacoma v. Andrus*, 457 F.Supp. 342, 346 (D.D.C. 1978).

Finally, the decision conflicts with established constitutional jurisprudence for the court of appeals declared Section 5 unconstitutional by reference to a hypothetical

land acquisition—"the purchase [of] the Empire State Building in trust for a tribal chieftain as a wedding present." Pet. App. 7a. In addition, the court declined to resolve an issue—the availability of judicial review of a Secretarial decision to take land into trust—which could have obviated the perceived constitutional infirmity. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). The court further read Section 5 in isolation from the remainder of the Act of which it is a part, without deference to the longstanding administrative practice, and without consideration of the oversight that Congress has exercised with regard to its implementation.

The court of appeals' decision has prompted states in other circuits to initiate actions challenging the Secretary of the Interior's authority to acquire land in trust for Indians. It harms every Indian tribe by subverting the remedial intent of Congress in the Indian Reorganization Act, and by raising questions on the validity of trust land acquisitions made prior to the date of the decision. This Court should grant the petition and reverse the judgment below, or vacate and remand for reconsideration in light of this Court's decision in *Loving* and the Secretary's recent action promulgating a rule that provides for judicial review of trust land decisions, 61 Fed. Reg. 18082 (April 24, 1996).

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULINGS ON THE NONDELEGATION DOCTRINE STATED IN *LOVING, MAZURIE* AND *CURTISS-WRIGHT*.

A. The President's constitutional and historic authority in Indian affairs renders the nondelegation doctrine inapplicable to Section 5.

This Court has consistently *rejected* nondelegation doctrine attacks on statutes which delegate power to an entity that " 'itself possesses independent authority over the

subject matter.'" *Loving v. United States*, No. 94-1966, slip op. at 24 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975))[4]; *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936). The rule, which was clearly stated in *Mazurie*, reflects the basic principle that each branch of the federal government—legislative, executive, and judicial—has authority to act without delegation from the other. Thus "[w]hen the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Article II." *INS v. Chadha*, 462 U.S. 919, 951 (1983). And where "the delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, . . . the same limitations on delegation do *not* apply. . . ." *Loving*, slip op. at 24 (emphasis supplied.)

These principles control here. The power of the Executive in Indian affairs has an independent basis in both the treaty making and war powers, U.S. Const. art. II, § 2, cl. 1-2, as well as in the President's power and duty to "take Care that the Laws be faithfully executed. . . ." U.S. Const. art. II, § 3. As this Court stated in *Morton v. Mancari*, "Article II, § 2, cl. 2 [which] gives the President the power, by and with the advice and consent of the Senate, to make treaties . . . has often been the

[4] In *Mazurie* this Court, in a unanimous decision, upheld against a nondelegation doctrine challenge a statute under which Congress delegated to Indian tribes the power to prohibit or regulate alcoholic beverages in Indian country. If a tribe exercises this authority, the statute makes violation of the tribal ordinance a federal criminal offense. 18 U.S.C. §§ 1154, 1161. Rejecting the claim that the statute was an invalid delegation of legislative power under *Panama Refining Co.*, the Court stated the rule—derived from *Curtiss-Wright* and most recently applied in *Loving*—that the limitations imposed by the nondelegation doctrine "are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," and found that Indian tribes possessed such independent authority. *Mazurie*, 419 U.S. at 556-58.

source of the Government's power to deal with the Indian tribes." 417 U.S. 535, 552 (1974); *see also Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).[5]

The Executive branch, through the Secretary of the Interior, also bears responsibility for fulfilling the United States' trust obligations to Indians, as this Court has often confirmed. *See United States v. Creek Nation*, 295 U.S. 103, 109, 110 (1935); *Cramer v. United States*, 261 U.S. 219, 227 (1923); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919). And this Court has further repeatedly upheld the President's authority to create Indian reservations by Executive order. *See Arizona v. California*, 373 U.S. 546, 598 (1963); *United States v. Midwest Oil Co.*, 236 U.S. 459, 470 (1915).

In clear conflict with the teaching of *Mazurie* and *Curtiss-Wright*—as recently reaffirmed by *Loving*—the court of appeals did not consider the constitutional powers and historic role of the Executive branch in Indian affairs. As a result, the court of appeals misapplied the nondelegation doctrine to Section 5 of the IRA. Properly applied, each of these cases compels the opposite result.

First, as in *Mazurie*, *Curtiss-Wright* and *Loving*, there is no question that Congress has the constitutional power to authorize the act at issue—here to acquire land in trust for Indians. *Seber*, 318 U.S. at 715-19[6]; *United States v. McGowan*, 302 U.S. 535, 537, 539 (1938).

[5] This is in addition to Congress' power under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

[6] Section 5 authorizes acquisition by purchase or donation, which is all that is at issue in this case. Moreover, in authorizing these acquisitions, Congress was well aware that land taken in trust would not be subject to state and local taxation. *Hearing before the Senate Committee on Indian Affairs on S. 2755*, 73rd Cong., 2d Sess. 160 (1934). Congress determined that in light of the financial benefits provided the states elsewhere, the protection of state tax bases was outweighed by the need to provide Indians with trust lands—a policy decision which is the exclusive prerogative of Con-

Second, just as in *Mazurie*, *Curtiss-Wright* and *Loving*, the entity to which the power was delegated has independent authority in the area of the delegation and has historically exercised duties interlinked with those covered by the statute. As noted, rulings of this Court have long recognized the President's powers under Article II as a source of federal authority in Indian affairs. And by the time Congress enacted the IRA in 1934, the Executive branch's broad discretionary authority in Indian affairs was well-established [7] and regularly upheld by this Court.[8]

Thus, if Section 5 of the IRA is a delegation of authority at all, it is to an official already "possess[ing] independent authority over the subject matter," *Mazurie*, 419 U.S. at 556-57, who is being assigned duties by Congress that are "interlinked with duties already assigned to the President by express terms of the Constitution," *Loving*, slip op. at 24. Accordingly, "the same limitations

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gress. *See Seber*, 318 U.S. at 715-19 (1943) ("[T]he fact that the Acts withdraw lands from the tax rolls . . . is for the consideration of Congress, not the Courts.")

[7] *See* 25 U.S.C. § 2 (Commissioner of Indian Affairs to have "management of all Indian affairs and of all matters arising out of Indian relations," originally enacted in the Acts of July 9, 1832, ch. 174, § 1, 4 Stat. 564; July 27, 1868, ch. 259, § 1, 15 Stat. 228); 25 U.S.C. § 9 ("President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. . . ." originally enacted in the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738); *see also* 25 U.S.C. § 81; *Cf. Loving*, slip op. at 24-25.

[8] *See, e.g., Parker v. Richard*, 250 U.S. 235 (1919) (upholding Secretarial authority for the collection, care, and disbursement of royalties under oil lease); *United States ex rel. West v. Hitchcock*, 205 U.S. 80 (1907) (upholding the Secretary's power to make membership decision in reviewing application for allotment). *Accord Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979) (upholding and giving preemptive force to Secretary's regulations on off-reservation fishing rights issued "under its general Indian powers, 25 U.S.C. §§ 2, 9"); *Arizona v. California*, 373 U.S. at 598 (upholding President's authority to create Indian reservations by Executive order.)

on delegation do not apply." *Id.* The court of appeals overlooked this clear conclusion.

B. The acquisition of land, as authorized by Section 5 of the Indian Reorganization Act, is an executive, not legislative function, and therefore falls outside the scope of the nondelegation doctrine.

A statute that authorizes the Executive branch to take an action or make a decision does not necessarily delegate a legislative function, even if the executive action contemplated by the statute were impossible without prior legislation. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926) (power of removal is executive power though the office is the creation of Congress); *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-39 (1952) (Jackson, J., concurring). These actions are exercises of executive power, even though they may depend upon an act of Congress, and even though Congress may in some circumstances expressly restrict their exercise. *Humphrey's Executor v. United States*, 295 U.S. 602, 629-32 (1935).

Acquisition of land for federal purposes—which includes that necessary to carry out the United States' trust responsibility to Indian tribes—is an inherently executive function. In enacting the IRA, Congress chose to rely on the Secretary of the Interior to make decisions regarding the acquisition of land in trust for Indians. Because the acquisition of land to meet the purposes of the IRA requires consideration of factors that will vary with each parcel and each tribe, it can hardly be expected that Congress would itself enact separate legislation with regard to each tract to be acquired. To the contrary, it was entirely consistent with established precedent for Congress to call upon the Secretary of the Interior to perform that task, and given the diverse needs and circumstances of Indian tribes nationwide, to accord to the Secretary broad discretionary authority to do so.

The same is true with regard to the function of acquiring land for federal purposes. Congress has consistently

authorized, and this Court has repeatedly approved, discretionary exercises of executive power by Executive branch officials in land transactions. The Court has found no delegation problem in federal statutes that vest executive branch officials with broad discretionary power to condemn lands for public purposes, a role far more intrusive than acquiring land from willing sellers or donors, which is all that is at issue in this case. *United States v. Carmack*, 329 U.S. 230 (1946); *see also Berman v. Parker*, 348 U.S. 26 (1954); *Chappell v. United States*, 160 U.S. 499, 510 (1896).

In *Carmack*, this Court discussed the need for executive discretion in land acquisition statutes. The Court noted, as to the acts in question, that: "[n]othing has been found in the legislative history of these acts to indicate that Congress intended to give its agents less than the fullest possible authority of Congress in selecting cities and sites." 329 U.S. at 236 n.5. The Court described the acts as a natural exercise of Congress' constitutional power:

> These Acts were natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time. Neither Act imposed expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions.

Id. at 236. And this Court declined to read into those land acquisition statutes, express or implied limitations on the officials' authority to acquire such land, finding that the need for any such limitation was a matter of legislative policy and not a decision for the courts. *Id. Accord Berman*, 348 U.S. at 33; *Chappell*, 160 U.S. at 510.

Finally, as reflected by the many decisions in which this Court has considered Indian reservations created by Executive order, the Court has never expressed a concern

about the discretion exercised by the Executive in so doing, but has instead sustained the President's power to create such reservations on the basis of Congress' long-standing acquiescence in the practice, *see, e.g., Arizona v. California*, 373 U.S. at 598, treating executive order reservations in the same way as those established by treaty. *See also United States v. Dion*, 476 U.S. 734, 745 n.8 (1986); *Antoine v. Washington*, 420 U.S. 194, 197-98 (1975); *United States v. Pelican*, 232 U.S. 444, 445 (1914); *Ex parte Wilson*, 140 U.S. 575, 576-77 (1891). Indeed, the Court long ago upheld the President's power, nowhere granted or regulated by Congress, to withdraw public lands from private acquisition when it seemed to him wise. *United States v. Midwest Oil Co.*, 236 U.S. at 469-71, 483.

The acquisition of land, as an inherently executive function, falls outside the scope of the nondelegation doctrine which has only been invoked to invalidate delegations of Congress' *lawmaking* functions. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The purpose to be served by this doctrine [9] does not warrant its application outside that context.

Schechter illustrates the limits of the doctrine. The National Industrial Recovery Act of June 16, 1933, ch. 90, 48 Stat. 195, struck down in *Schechter*, would have fundamentally changed the form of American government through wholesale transfer of genuine *legislative* functions to private industrial groups and the President. Under that Act, Congress delegated to trade groups for each set of industries in the country the right to draft "codes of fair competition" imposing minimum wages, quality standards, trade practices, labor rules, industrial safety prac-

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[9] *See Loving*, slip op. at 8-9 (purpose of the doctrine is to give effect to the separation of powers, and ensure that Congress, as the "branch most capable of responsive and deliberative *lawmaking*," not forsake those duties without appropriate standards for their exercise) (emphasis supplied).

tices and the like. These codes, if approved by the President, would have the force of laws and carry criminal penalties. 295 U.S. at 521-26, 27. The Court held the Act to be an unconstitutional delegation of congressional power because it left the authority to *draft laws enforced by criminal sanction* to private persons, without any statement defining the specific objectives that the codes were to address other than "fair competition," 295 U.S. at 529-31, and without any review by a judicial body. *Id.* at 540.[10]

Schechter and *Panama Refining*[11] stand in sharp contrast to the authority provided to the Secretary under Section 5. Both cases involved the enactment of rules or standards that govern the rights and liabilities of persons —a legislative function. In contrast, Section 5 involves no delegation of authority to enact law or to regulate private conduct. It does nothing more than authorize the Secretary to acquire lands from willing sellers or donors pursuant to the IRA, which is an inherently executive function that simply does not implicate the nondelegation doctrine. Thus, the statute is plainly constitutional. Indeed, if a delegation to Indian tribes of regulatory author-

[10] A similar problem was presented by the part of the statute at issue in *Panama Refining* where again, Congress delegated to the President the authority to develop *laws* that would prohibit some shipments of petroleum in interstate commerce, the violation of which gave rise to criminal penalty. 293 U.S. at 414-15.

[11] Like *Schechter* and *Panama Refining*, other cases in which this Court has considered the nondelegation doctrine involved executive creation of rules or standards that govern the rights or liabilities of private persons, such as criminal laws or tax codes. Even as to these cases, the Supreme Court has, since 1935, rejected each and every nondelegation doctrine challenge. *See, e.g., Loving*, slip op. at 23, 25 (promulgation of factors that warrant the death penalty in military court martials); *Touby v. United States*, 500 U.S. 160, 162-64, 167 (1991) (making manufacture of a specified drug criminal); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 214-15, 224 (1989) (imposing user fees or taxes); *American Power & Light Co.*, 329 U.S. at 97, 104-06 (circumstances for dissolution of public utility holding company); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 401, 404-11 (1928) (raising tariffs).

ity that is enforceable by federal criminal sanction approved in *Mazurie* does not violate the nondelegation doctrine, certainly a statute authorizing the Secretary of the Interior—an Executive branch official with broad recognized authority in Indian affairs—to acquire land for Indians, a typical executive function, does not do so.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THIS AND OTHER COURTS, WHICH HAVE CONSISTENTLY RECOGNIZED THE VALIDITY OF SECTION 5 OF THE IRA.

An unbroken line of judicial authority has given effect to Section 5 and upheld the Secretary's authority to acquire lands for Indians in accord with the purposes of the IRA. When this section was before the Court in 1973, the Court relied upon Section 5 as authority for the Secretary to lease Forest Service lands *outside* a reservation to assist a tribal business enterprise—a ski resort—"as anticipated by sections 476 and 477" of the IRA. *Mescalero Apache Tribe*, 411 U.S. at 146, 157. The Court further held that as a result of the express terms of Section 5, the lands so leased were immune from state property taxes. *Id.* at 158.

The Secretary's authority to take land in trust for Indians under this statute has been upheld in every other case in which state or local governments or others have attacked its exercise. *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978), a decision from the Court of Appeals for the Eighth Circuit, not overruled by the court below, *rejected* a city's claim that the Secretary lacked authority to accept land into trust that was already owned by an individual Indian in fee and located within city boundaries. In so doing, the court relied on this Court's decisions in *Seber* and *Mescalero Apache Tribe* to determine the scope of the Secretary's authority under Section 5 and concluded that by that section, Congress "authorized the Secretary to acquire land for Indians," and that the Secretary had *not* "exceeded

his delegated authority" when he accepted the land for placement into trust. *Id.* at 1016.

Similarly, the Court of Appeals for the Eleventh Circuit, in rejecting a state's suit to divest land of its trust status, *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1252 (11th Cir. 1985), found "there can be no doubt that there was statutory authority for the Secretary's decision to take the land in trust." The court considered the section in the context of other sections of the Act, as well as its overall purposes, *id.* at 1255-56 (citing 25 U.S.C. §§ 461, 462, 464), and concluded that because "the decision to acquire a particular tract of land would involve a myriad of factors," Congress necessarily vested the Secretary with broad discretion, and that the delegation of such discretionary authority was entirely consistent with established precedent. *Id.* at 1256-57.[12]

III. THE EIGHTH CIRCUIT VIOLATED FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL JURISPRUDENCE WHEN IT DECLARED SECTION 5 UNCONSTITUTIONAL BY EXAMINING IT IN THE CONTEXT OF A HYPOTHETICAL AND REFUSED TO ADDRESS AN ISSUE THAT MIGHT HAVE OBVIATED THE CONSTITUTIONAL QUESTION.

Even assuming, *arguendo* that Section 5 can be said to raise a nondelegation doctrine issue, the IRA contains the necessary standards. The court of appeals reached a contrary conclusion by examining the statute by reference to a hypothetical purchase of the "Empire State Building . . . for a tribal chieftain as a wedding present." Pet. App. at 7a. By making its ruling turn on an imagined acquisition, rather than the particular facts of the case, the court disregarded the fundamental rule that "[t]he delicate power of pronouncing an Act of Con-

[12] To the same effect, *see City of Sault Ste. Marie*, 532 F. Supp. at 162; *City of Tacoma*, 457 F. Supp. at 345-46. *Accord United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir. 1987); *Langley v. Edwards*, 872 F. Supp. 1531, 1536 n.5 (W.D.La. 1995).

gress unconstitutional is not to be exercised with reference to hypothetical cases. . . ." *United States v. Raines*, 362 U.S. 17, 22 (1960).

The court also violated the "fundamental rule" that "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for the decision," *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (internal quotations and citations omitted), by declining to decide whether a Secretarial decision on a trust land acquisition is judicially reviewable. Resolution of that issue might well have cured any perceived infirmity of the statute under the nondelegation doctrine, as this Court has upheld broad delegations of congressional power where judicial review was available. *See American Power & Light Co.*, 329 U.S. at 105.

IV. SECTION 5 IS CONSTITUTIONAL AS THE IRA, ITS LEGISLATIVE HISTORY, JUDICIAL CONSTRUCTION, AND ADMINISTRATIVE PRACTICE ESTABLISH STANDARDS DEFINING THE SCOPE OF THE SECRETARY'S AUTHORITY.

When examined in the context of the IRA, its legislative history, judicial construction and the administrative practice, it is clear that Section 5 is constitutional. The acquisitions authorized by Section 5 may only occur by "purchase, relinquishment, gift, exchange, or assignment" which Congress directed be made "for the purpose of providing land for Indians . . . pursuant to this Act." Thus, Section 5 authorizes the Secretary to acquire lands that are needed for Indians to achieve the IRA's statutory purposes, which are set forth not only in Section 5, but the other sections of the IRA to which Section 5 expressly refers.

The purposes of the IRA have often been described by this Court. They are "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Mancari*, 417 U.S. at 542; *Fisher v. District Court*, 424

U.S. 382, 387 (1976), to restore stability to Indian communities, *United States v. John*, 437 U.S. 634, 645-46 (1978), and to promote Indian economic development. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe*, 411 U.S. at 151-52.

In adopting the Act, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved unless tribes had lands that were adequate to support the activities necessary to achieve these goals. Congress knew the history of the Indian land losses,[13] and fully intended to reverse the policy that had produced those losses.[14] Thus, Congress in Section 5 was acting, and intended to act, well within its traditional role of according the Secretary broad authority in the field of Indian affairs—in this case discretionary power to acquire land for Indians pursuant to the IRA.

If there were any doubt about the standards governing the Secretary's authority under Section 5, it is answered by applicable Interior Department regulations which further define the Secretary's power and which have since been ratified by Congress. Consistent with the purposes of the IRA, the regulations recite that land may be acquired in trust for a tribe or its members when the land

[13] *See* 78 Cong. Rec. 11726, 11732 (1934) (statements of Rep. Howard, Chairman of the Committee on Indian Affairs); *see also* Memorandum of Commissioner Collier on the purposes of the pending bill, printed in *Hearing before the Senate Committee on Indian Affairs on S. 2755*, 73rd Cong., 2d Sess. 17 (1934).

[14] To do so, Congress provided, in seven sections of the IRA, a series of measures to end the loss of Indian lands, and restore to tribes the land base necessary to achieve the goals of the Act. Thus, in addition to authorizing the Secretary to acquire land for Indians, 25 U.S.C. § 465, the Act ended the policy of allotment of reservation lands, 25 U.S.C. § 461, extended the trust status of restricted lands indefinitely, 25 U.S.C. § 462, restored unallotted lands to tribal ownership, 25 U.S.C. § 463, and authorized voluntary exchanges of land from allottees to tribes. 25 U.S.C. § 464. The Act further allowed the Secretary to establish new Indian reservations with newly acquired trust lands or add those lands to existing reservations. 25 U.S.C. § 467.

is within or adjacent to the reservation, "when the tribe already owns an interest in the land," or when acquisition "is necessary to facilitate tribal self-determination, economic development, or provide Indian housing." 25 CFR § 151.3(a).[15] In connection with any such acquisition—whether within or outside the reservation—the Secretary is further required to consider a series of enumerated factors.[16]

The regulations show the intelligible boundaries on the Secretary's exercise of discretion under Section 5 and provide a level of specificity far beyond that needed to satisfy the nondelegation doctrine. *See Lichter v. United States*, 334 U.S. 742, 771, 773-74, 776-86 (1948) (factors provided by agency regulations); *Motor Vehicle*

[15] The regulations were formally published in the Code of Federal Regulations on September 18, 1980, 45 Fed. Reg. 62036, and amended on June 23, 1995, 60 Fed. Reg. 32874. Another amendment on judicial review was made this year. 61 Fed. Reg. 18082 (April 24, 1996).

[16] These include the tribe's need for the land, the purposes for which it will be used, 25 CFR §§ 151.10(b), (c), (h); 151.11(a), and the tax and jurisdictional impact that the trust acquisition would have on the state and local governments. *Id.* at §§ 151.10(e), (f); 151.11(a). Notice must be given to state and local governments with an opportunity to comment. *Id.* at § 151.10. If the land is located outside the tribe's reservation additional requirements apply. The Secretary will consider the distance of the parcel from reservation boundaries and "as the distance between the . . . reservation and the land to be acquired increases," "greater scrutiny [is given] to the tribe's justification of anticipated benefits" and more weight to concerns expressed by state and local governments. *Id.* at § 151.11(b), (d). If the off-reservation land is to be used for business purposes, the tribe must prepare a business plan. *Id.* at § 151.11(c). The Secretary has denied applications that failed to meet these requirements. *E.g., Miami Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 28 IBIA 52 (June 8, 1995), *reported in* 22 Ind.L.Rep. 7097 (Dec. 1995) (proposed acquisition too far from the tribe's other lands); *McAlpine v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 2 (Oct. 10, 1990), *reported in* 17 Ind.L.Rep. 7100 (Nov. 1990).

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983) (agency practice relevant). If there were any remaining questions about the standards governing the Secretary's exercise of that authority, the availability of judicial review of Secretarial decisions on trust land applications has obviated them. *See* 61 Fed. Reg. 18082 (April 24, 1996); *cf. American Power & Light Co.*, 329 U.S. at 105.[17] If the statute were viewed as insufficiently definite, the Secretary's regulations should be given "controlling weight." *Nationsbank of North Carolina, N.A. v. Variable Life Ins. Annuity Co.*, 513 U.S. ——, 130 L.Ed.2d 740, 748 (1995) (internal quotations and citations omitted).

V. CONGRESS, BY STATUTES ENACTED SINCE THE IRA, HAS EXERCISED THE OVERSIGHT NECESSARY TO ENSURE THAT SECTION 5 IS IMPLEMENTED CONSISTENT WITH CONGRESSIONAL INTENT.

Congressional oversight during the 60 years that Section 5 has been in effect has served to ensure that the Secretary's authority under Section 5 of the IRA does not exceed Congress' intent. Congress has limited the application of Section 5 where it deemed such limitations appropriate. In both the Act as originally adopted, and in subsequent statutes, Congress expressly defined the tribes to which Section 5 is, and is not, available.[18]

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[17] Amici concur in the Petitioners' request that given this new rule, and this Court's intervening decision in *Loving*, the decision of the court of appeals be vacated, with instructions to remand to the Secretary for reconsideration of the trust application in light of the new rule. As this Court has consistently held, agency regulations—including new rules—are entitled to considerable deference. *See Smiley v. Citibank, N.A.*, No. 95-860, slip op. at 3-5, 64 U.S.L.W. 4399, 4401 (U.S. June 3, 1996) (requiring deference to an agency regulation interpreting a 100-year old statute; that the regulation was recently promulgated in response to litigation, including the suit at issue before the Court, was irrelevant).

[18] The original Act limits its application by providing that no part of funds appropriated to purchase lands for Indians shall be used to acquire land for the Navajo Tribe outside its reservation. 25 U.S.C. § 465. In 1993, while providing a land base for the Catawba Tribe, Congress expressly made 25 U.S.C. § 465 inapplicable to that Tribe. *See* 25 U.S.C. § 941j(m). *Cf.* ns. 19-20 *infra*.

Likewise, when Congress adopted the Indian Gaming Regulatory Act in 1988, it limited the extent to which trust land could be acquired by tribes after October 17, 1988 for purposes of gaming, by requiring the consent of the State Governor for any such trust acquisition. 25 U.S.C. § 2719(b)(1)(A).

Significantly, Congress has imposed these additional requirements, or restricted Section 5 in specific circumstances *without* otherwise altering the availability of Section 5 and without altering the manner in which the Secretary and the courts have construed its scope. Indeed, Congress has, in other recent statutes, deliberately chosen to extend Section 5 to certain tribes not previously covered by it.[19] Congress has also expressed its satisfaction with the Secretary's regulations governing trust land acquisitions by enacting laws which, in the text of the statute, expressly refer to those regulations.[20]

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[19] By the Act of January 12, 1983, Pub. L. No. 97-459, § 203, 96 Stat. 2517, *codified at* 25 U.S.C. § 2202, Congress extended Section 5 to tribes that had not organized under the IRA. By statutes passed in 1988, Congress made clear its intent that Section 5 be available to the Yakima Indian Nation and the Yurok Tribe. Acts of November 1, 1988, Pub. L. No. 100-581, § 213, 102 Stat. 2941, and May 24, 1990, Pub. L. No. 101-301, § 1(a)(3), (b), 104 Stat. 206, *codified at* 25 U.S.C. § 608(c) (Yakima); Act of October 31, 1988, Pub. L. No. 100-580, § 2, 102 Stat. 2925, *codified at* 25 U.S.C. § 1300i-1(c)(3)(A) (Yurok). In 1994, Congress made Section 5 available to two newly-recognized Indian tribes. Act of October 31, 1994, Pub. L. No. 103-434, § 204, 108 Stat. 4534, *codified at* 25 U.S.C. § 1300*l*-2(a); Act of November 2, 1994, Pub. L. No. 103-454, § 305, 108 Stat. 4794, *codified at* 25 U.S.C. § 1300m-3.

[20] One example is the Puyallup Land Settlement Act, *see* n.1, *supra*, Act of June 21, 1989, Pub. L. No. 101-41, § 5, 103 Stat. 86, *codified at* 25 U.S.C. § 1773c. *See also* Mohegan Nation Settlement Act of October 19, 1994, Pub. L. No. 103-377, § 5, 108 Stat. 3504, *codified at* 25 U.S.C. § 1775c.

As these subsequent statutes show, Congress is aware of the scope of Section 5 and has deliberately taken measures to ensure that the Secretary's implementation of that Act is consistent with congressional intent. Congress has further reconfirmed its intent that the law remain in effect and available to fulfill congressional policy for Indians. Thus, the construction given this statute by the Secretary and Congress demonstrates that the statute, to the extent it is a delegation of legislative authority at all, is limited and contains intelligible standards from which the boundaries of the Secretary's exercise of discretion can be discerned—as required by the nondelegation doctrine.

CONCLUSION

The writ of *certiorari* should be granted, and the decision below either reversed or vacated and remanded to the Secretary for consideration in light of the Secretary's recent rule and this Court's decision in *Loving v. United States*.

Respectfully submitted,

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